In the Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-1370

IN RE SUGAR ANTITRUST LITIGATION
MDL-201

CALIFORNIA AND HAWAIIAN SUGAR COMPANY, AMALGAMATED SUGAR COMPANY, AMERICAN CRYSTAL SUGAR COMPANY, AMSTAR CORPORATION, THE GREAT WESTERN SUGAR COMPANY, HOLLY SUGAR CORPORATION, UNION SUGAR DIVISION, CONSOLIDATED FOODS CORPORATION, U AND I INCORPORATED, and CALIFORNIA BEET GROWERS ASSOCIATION, LTD.,

Petitioners,

vs.

STATE OF CALIFORNIA AND MADELYNE BRINKER,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

Respondent State of California's Brief in Opposition

GEORGE DEUKMEJIAN
Attorney General

ROBERT PHILOBOSIAN
Chief Assistant Attorney General
Criminal Division

SANFORD N. GRUSKIN
Assistant Attorney General

MICHAEL I. SPIEGEL
RICHARD N. LIGHT
Deputy Attorneys General

6000 State Building
San Francisco, California 94102
Telephone: (415) 557-0211

Attorneys for Respondent State of California

SORG PRINTING COMPANY OF CALIFORNIA, 346 FIRST STREET, SAN FRANCISCO 94105

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QUESTION PRESENTED

Whether an action brought in California Superior Court by the State of California on behalf of itself and its citizens and residents, and expressly grounded solely on California

state antitrust laws, is removable under 28 U.S.C. § 1441 (b) as an action "arising under" federal law.

STATUTES INVOLVED

This case involves those statutes set forth in the Petition, pp. 4-6, and in addition California Business and Professions Code section 16760, which in pertinent part is as follows:

> "(a) (1) The Attorney General may bring a civil action in the name of the people of the State of California, as parens patriae on behalf of natural persons residing in the state, in the superior court of any county which has jurisdiction of a defendant, to secure monetary relief as provided in this section for injury sustained by such natural persons to their property by reason of any violation of this chapter. The court shall exclude from the amount of monetary relief awarded in such action any amount of monetary relief (A) which duplicates amounts which have been awarded for the same injury, or (B) which is properly allocable to . . . (ii) any business entity."

STATEMENT OF THE CASE

Respondent State of California filed its complaint in the Superior Court of the State of California on February 4, 1976, seeking recovery of damages for itself and its citizens and residents based on alleged violations by defendants[1] of the California antitrust laws, commonly referred to as the California Cartwright Act (Calif. Bus. & Prof. Code § 16600 *et seq.*). The complaint alleged a class of consumers under California Code of Civil Procedure section 382, a common law *parens patriae* claim,[2] and sought equitable relief under California Business and Professions Code sections 16754 and 16754.5 (Pet. App. F).

1. Those petitioners which are defendants in California's action are: California and Hawaiian Sugar Company, American Crystal Sugar Company, Amstar Corporation, Holly Sugar Corporation, Union Sugar Division, Consolidated Foods Corporation, and California Beet Growers Association, Ltd. The remaining three petitioners, together with certain of those that are defendants in California's action, are defendants in the action by Madelyne Brinker.

On March 18, 1976, petitioners removed respondent's action to the United States District Court for the Northern District of California. Removal jurisdiction was alleged based on federal question grounds (28 U.S.C. § 1441 (b)) and on the ground of diversity as to separate and independent claims (28 U.S.C. § 1441 (c)).[3]

On March 31, 1976, respondent State of California moved the district court for an order remanding its action to the California Superior Court.

On July 23, 1976, the district court denied respondent's motion to remand. The district court in its memorandum decision assumed without discussion that California's action arose under federal, not state, law, and requested review by the Court of Appeals and by this Court of this Court's derivative jurisdiction doctrine (Pet. App. C).

The Court of Appeals reversed, ordering that respondent's action and the action by respondent Brinker be remanded to state court. The Court of Appeals concluded that California's claims in its complaint (1) "arose under state law", and (2) "do not arise under federal law" (Pet. App. A, p. 7).

REASONS FOR DENYING THE WRIT

The result reached by the Court of Appeals is correct. Petitioners raise no serious challenge on legal grounds.

2. California Business and Professions Code section 16760, creating a California statutory *parens patriae* action, was enacted in 1977, after the filing of California's complaint.

3. Petitioners no longer defend removal on the basis of diversity.

Petitioners resort to making extreme demands upon this Court under which: (1) established tests for removal are ignored, (2) state antitrust laws generally, and California's in particular, would be preempted with no prior opportunity for consideration by California courts of relevant state statutes, (3) removal jurisdiction of federal district courts would be expanded, and (4) the doctrine of derivative jurisdiction would be eliminated.

I. Respondent California's Action "Arises Under" State, Not Federal, Law.

A. PETITIONERS IGNORE ESTABLISHED TESTS FOR REMOVAL.

Petitioners ignore established tests for removal jurisdiction. Application of established tests dictates the correctness of the conclusion by the Court of Appeals that California's claims in its complaint filed in California Superior Court ". . . arise under state law and do not arise under federal law." (Pet. App. A, p. 7).

An action "arises under" federal or state law depending on how plaintiff ". . . casts his action." *Pan American Petroleum Corp. v. Superior Court,* 366 U.S. 656, 662 (1961). The plaintiff is ". . . master to decide what law he will rely upon . . .." *The Fair v. Kohler Die Co.,* 228 U.S. 22, 25 (1913). When a plaintiff has elected to proceed under state law in state court, it is thus ". . . immaterial . . . that the plaintiff could have elected to proceed on a federal ground." *Pan American Petroleum Corp. v. Superior Court, supra* at 663.[4]

4. The tests are essentially the same whether the question arises from a motion to dismiss an action invoking the original jurisdiction of the federal court, *Bell v. Hood,* 327 U.S. 678, 679 (1946), from a motion to dismiss an action invoking the original jurisdiction of a state court, *Pan American Petroleum Corp. v. Superior Court, supra* at 657, or from, as here, a motion to remand after removal to federal court. *Gully v. First National Bank in Meridian,* 299 U.S. 109, 112 (1936). *See also* Wright, Miller and Cooper; *Federal Practice and Procedure:* Jurisdiction § 3722.

A federal question, in order to support removal jurisdiction, ". . . must be an element and an essential one, of the plaintiff's cause of action." *Gully v. First National Bank in Meridian, supra* at 112. *See also Phillips Petroleum Co. v. Texaco, Inc.,* 415 U.S. 125, 127 (1974). It is not sufficient that the complaint may disclose an anticipated defense on federal grounds, *Skelly Oil Co. v. Phillips Co.,* 339 U.S. 667, 672 (1950), or that ". . . defendant is almost certain to raise a federal defense", *Pan American Petroleum Corp. v. Superior Court, supra* at 663, or that federal cases may be referred to for guidance or interpretation. *Cf. Gully v. First National Bank in Meridian, supra* at 115. *See also Minnesota v. Northern Securities Co.,* 194 U.S. 48, 65 (1904) (dictum).

Respondent California's complaint shows clearly an election to proceed on the basis of California state antitrust law and to eschew any reliance on federal antitrust laws.[5] California invoked jurisdiction of its state court pursuant to California Business and Professions Code sections 16750, 16754, and 16754.5, charged defendants with having violated the California state antitrust laws set forth in California Business and Professions Code section 16720, and sought treble damages for itself and a class composed of its citizens and residents pursuant to California Business and Professions Code section 16750(c). California in the alternative alleged a right of equitable recovery pursuant to California Business and Professions Code sections 16754 and 16754.5, and referenced California Constitution Article V, section 13 in alleging a right to represent its citizens and residents under a state common law *parens patriae* theory.

5. California acknowledges a lone, insignificant, and inadvertent reference in its complaint to the Sherman Act. (Pet. App. F., p. 44)

The Court of Appeals, although it failed to express its reasons, unmistakably was applying established tests to the plain facts set forth above when it stated, "*Here we are squarely faced with claims asserted under California antitrust law . . .*" [emphasis added] (Pet. App. pp. 4-5), and concluded that California's claims ". . . *arise under state law and do not arise under federal law.*" [emphasis added] (Pet. App. A, p. 7). Petitioners, in contrast, do not acknowledge the above facts, nor do they discuss the applicable law. The petition, for that and other reasons, fails to raise any substantial legal controversy.

B. PETITIONERS BELATEDLY RAISE A HYPOTHETICAL AND UNMERITORIOUS PREEMPTION ARGUMENT WHICH, IF ACCEPTED, WOULD GREATLY EXPAND FEDERAL REMOVAL JURISDICTION.

Petitioners for the first time[6] now resort to a preemption argument in an attempt to overcome the inescapable conclusion that California's complaint raises state, not federal, antitrust law claims. Petitioners avoid the term "preemption", but nevertheless assert the "paramountcy" of federal antitrust laws (Pet. p. 19). Petitioners argue that California's antitrust laws in particular are preempted on the basis of a supposed conflict with this Court's ruling in *Illinois Brick Co. v. Illinois,* 431 U.S. 720 (1977). Petitioners' arguments, respondent submits, are both hypothetical and unmeritorious, and would, if accepted, result in an unwarranted expansion of federal removal jurisdiction.

6. Petitioners expressly conceded in the district court below that California state antitrust laws were not preempted (Defs'. Memo in Oppos. . . . Fed. Quest. Grnds., p. 18), and failed to raise a preemption argument in the Court of Appeals. Petitioners' argument in support of removal in the Court of Appeals was based on *res judicata* cases, in which the facts involved rather than the statutes alleged are determinative. *See, e.g., Williams v. Columbia Gas & Electric Corp.,* 186 F.2d 464, 468 (3rd Cir. 1950) *cert. denied* 341 U.S. 921 (1951). Petitioners in probable recognition that acceptance of their position would have removed practically all existing restrictions on removal jurisdiction have now dropped entirely their argument based on *res judicata* cases.

This Court held long ago that the federal antitrust laws do not preempt state law, even in matters of interstate commerce. *Standard Oil Co. v. Tennessee,* 217 U.S. 413, 422 (1910). Twenty-one (21) states had statutes proscribing combinations in restraint of trade at the time of passage of the Sherman Act. Note, *"The Commerce Clause and State Antitrust Enforcement"*, 61 Colum. L. Rev. 1469, 1469 (1961).[7] The purpose of Congress in passing the Sherman Act was to supplement, not preempt, state antitrust enforcement.

> "This bill . . . has for its . . . object to invoke the aid of the courts of the United States to deal with the combinations . . . when they affect injuriously our foreign and interstate commerce . . . and in this way to supplement the enforcement of the established rules of the common and statute laws by the several states in dealing with combinations that affect injuriously the industrial liberty of the citizens of those states . . .." 21 Cong. Rec. 2457 (1890). (remarks of Sen. Sherman)

Nor do petitioners raise any substantial arguments regarding preemption of California's antitrust laws. Petitioners' argument is that since indirect purchasers generally may not show injury by proof of passing-on, *Illinois Brick, supra,* and direct purchasers may generally recover the whole overcharge, *Hanover Shoe v. United Shoe Machinery Corp.,* 392 U.S. 481, 494 (1968), a problem of double recovery arises when an indirect purchaser brings suit in

7. The so-called California Cartwright Act was passed in 1907. Calif. Stats. 1907, c. 530, p. 984.

California state court because California has enacted a statute which confirms the right of indirect purchasers to sue. Calif. Bus. and Prof. Code § 16750, as amended. Petitioners' argument is both legally and factually hypothetical.[8] It is also without merit.

California courts should be given an opportunity to interpret California's *Illinois Brick* statute before this Court makes any ruling on the basis of a supposed "conflict". Petitioners may argue, for instance, if and when this case is returned to state court that California's *Illinois Brick* statute is not that at all, and that indirect purchasers under California law, as under federal law, are precluded from showing injury by proof of passing on. It is inconceivable in any case that California courts would not take whatever steps necessary to preclude the possibility of double recoveries.[9] Petitioners in reality are seeking removal in order to avoid single, not double, recovery.

No substantial issue of preemption would arise even if petitioners could demonstrate that their conjured threat of double recovery were real rather than speculative. *Illinois Brick* relates to courtroom procedures and to matters of proof, not to standards of behavior. There is no risk here of the imposition by California of different standards of behavior from those imposed under the federal antitrust laws. California's antitrust laws furthermore are in a traditional area of local concern well within the scope of its police powers, especially where they are used, as here, by

8. This Court has long had a policy against deciding hypothetical constitutional questions in "advance of . . . necessity". *Parker v. County of Los Angeles*, 338 U.S. 327, 333 (1949). *Accord: Alabama Federation of Labor v. McAdory*, 325 U.S. 450, 461, 470 (1945).

9. It is clearly the policy of the State of California, at least in regard to *parens patriae* antitrust actions, that there shall be no duplicative recoveries. Calif. Bus. and Prof. Code § 16760.

the State itself to protect the interests of its citizens as consumers. *Florida Lime and Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 144, 146 (1949).

Petitioners' entire preemption argument, even if it were ripe for determination and were meritorious, is properly a defense to California's action in state court, not a ground for removal to federal court. *Williams v. First National Bank*, 216 U.S. 582, 594 (1910); *State of Washington v. American League of Professional Baseball Clubs*, 460 F.2d 654, 660 (9th Cir. 1972). The approach taken by petitioners, if accepted, would lead to a substantial and unwarranted expansion of federal removal jurisdiction to cover any case brought in state court in which the defendant might raise a possible preemption argument.

C. PETITIONERS OVERLOOK THE CONTEXT, AND MISINTERPRET THE PURPOSE, OF THE DISCUSSION BY THE COURT OF APPEALS OF ILLINOIS BRICK.

Petitioners complain that the Court of Appeals erroneously confused the question of removal jurisdiction with a question on the merits of whether the complaint states facts sufficient to constitute a cause of action under federal law. The Court may well have confused the two questions, *Bell v. Hood, supra* at 682, but to the extent such is true, it is also beside the point, since the proper test is not whether the facts constitute a cause of action under federal law, but is rather whether California's claims "arise under" state law, and the Court did so find.

Any confusion by the Court, furthermore, is a direct result of petitioners' falacious argument, now abandoned, that removal jurisdiction is determined solely by reference to the facts alleged. The Court of Appeals simply adopted petitioners' position for the sake of argument, respondent submits, and showed how petitioners had become trapped

by their own unfounded argument through an unanticipated change in the law.[10]

II. Petitioners in Effect Ask This Court to Eliminate the Derivative Requirement for Removal Jurisdiction.

It has long been the view of this Court that a federal district court acquires no jurisdiction after removal from state court if the state court itself lacked jurisdiction. *Lambert Run Coal Co. v. Balt. & Ohio R.R. Co.*, 258 U.S. 379, 382 (1922). Since jurisdiction under the Clayton and Sherman Acts is exclusively federal, 15 U.S.C. Sec. 15, an action under those laws may not be brought in state court, and, even if brought, is not properly removable to federal court. *General Investment Co. v. Lakeshore and Michigan Railway Co.*, 260 U.S. 261 (1922); *Caraway v. Ford Motor Co.*, 144 F.Supp. 295, 296 (W.D. Mo. 1956). *See also State of Washington v. American League of Professional Baseball Clubs, supra*, at 658.

Petitioners, having taken a position under which they are forced to ignore established tests for removal, and to argue for the preemption of all state antitrust laws and California's in particular in a manner that would greatly expand removal jurisdiction, now must necessarily also argue for the elimination of the derivative requirement for removal jurisdiction. Petitioners appear reluctant to take this last step, however, and so pretend instead that they did not really ask for total preemption of state law, that they really intended to preserve just enough state law to satisfy the derivative nature of removal jurisdiction. Petitioners' pretension allows them to argue that they seek to contain the doctrine of derivative jurisdiction, rather than to eliminate it or to create an exception. The resort by petitioners to plain sophistry reveals their awareness of the lack of substance in the position they take.

The district court below, which otherwise supported petitioners, rejected petitioners' argument that California's complaint arises under federal, not state, law for one purpose and arises under state, not federal, law for another. The district court instead requested elimination of the derivative jurisdiction doctrine in multidistrict litigation cases. (Pet. App. C, p. 17) Petitioners offer no support for the district court's request, thereby revealing the lack of substance in the Court's position.[11]

The history of this litigation on petitioners' side has been not only their struggle to eliminate the state statutes from California's complaint, but to do so without running afoul of the derivative jurisdiction requirement. Respondent submits that petitioners have presented no substantial legal basis for accomplishing either result.

10. The law in the Ninth Circuit as to the offensive use of passon at the time the petitioners filed their responding brief in the Court of Appeals was opposite to that finally pronounced by this Court in *Illinois Brick. In Re Western Liquid Asphalt Cases*, 487 F.2d 191 (9th Cir. 1973), *cert. denied* 94 S.Ct. 1419 (1974).

11. The Court of Appeals also considered that the district court's position lacked substance, wherein it stated:

> "Where [as here] the purpose is not to bring the challenged action to trial but to stay it . . . a forthright motion to enjoin state action would focus on the true problem more accurately. . . ." (Pet. App. A, p. 7).

CONCLUSION

Respondent respectfully prays that the petition be denied.

GEORGE DEUKMEJIAN
Attorney General

ROBERT PHILOBOSIAN
Chief Assistant Attorney General
Criminal Division

SANFORD N. GRUSKIN
Assistant Attorney General

MICHAEL I. SPIEGEL
RICHARD N. LIGHT
Deputy Attorneys General

Attorneys for Respondent
State of California